

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

Aniano Torres-Mendez

v.

Civil No. 09-cv-00214-SM

Richard M. Gerry, Warden,
New Hampshire State Prison

O R D E R

Before the court for preliminary review is pro se petitioner Aniano Torres-Mendez's petition for a writ of habeas corpus (doc. no. 1), filed pursuant to 28 U.S.C. § 2254, asserting federal constitutional claims under the Eighth and Fourteenth Amendments challenging the sufficiency of the identification evidence introduced in his criminal trial. See Rule 4 of the Rules Governing § 2254 Proceedings ("§ 2254 Rule") (requiring initial review to determine whether the petition is facially valid and may be served); see also United States District Court for the District of New Hampshire Local Rules ("LR") 4.3(d) (authorizing the magistrate judge to preliminarily review pro se pleadings).

In my Report and Recommendation issued on this date, I have recommended that Torres-Mendez's Eighth Amendment claim be dismissed. I have also found that Torres-Mendez has not shown that he has exhausted his Fourteenth Amendment Due Process claim

in the state courts.

Accordingly, I will give Torres-Mendez the opportunity to amend his complaint to demonstrate exhaustion of the federal due process claim. To that end, Torres-Mendez is directed that, within thirty days of the date of this Order, he must:

1. Amend his petition to demonstrate that the federal due process claim has in fact been exhausted, by, for example, providing this Court with copies of any briefs or other documents filed in the state courts that refer to his federal due process claim; or, if the claim has not yet been exhausted,
2. Move to stay this action so that he may return to the state courts to exhaust the claim. If Torres-Mendez elects to stay this action and return to the state courts to complete exhaustion, he must file his state court action within thirty days of the date of this Order. While this matter is stayed, Torres-Mendez must notify this Court of the status of his state court matter every ninety days. Once the New Hampshire Supreme Court has issued a final decision, Torres-Mendez must so notify this Court within thirty days of that decision, providing this Court, at that time, with complete copies of documents filed in the state courts demonstrating that the claim, including the

federal nature of the claim, has been raised and exhausted.

Torres-Mendez should also provide this Court with complete copies of any orders or opinions issued by the state courts relative to the claim.

Should Torres-Mendez fail to amend his petition as directed, or otherwise fail to comply with this Order, the petition may be dismissed for failure to demonstrate exhaustion.¹ See 28 U.S.C. § 2254(b).

SO ORDERED.



James R. Muirhead
United States Magistrate Judge

Date: July 29, 2009

cc: Aniano Torres-Mendez, pro se

¹If this petition were to be dismissed for failing to demonstrate exhaustion, the dismissal would be without prejudice as it would be procedural, and not based on the merits of Torres-Mendez's claim. See Slack v. McDaniel, 529 U.S. 473 (2000).